

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>KATHLEEN CAMPBELL</b>	:	SMALL CLAIMS
	:	DETERMINATION
	:	DTA NO. 820272
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Year 2001.	:	

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Petitioner, Kathleen Campbell, 1119 Park Place, Brooklyn, New York 11213, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 2001.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 5, 2005 at 1:15 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Thomas Jess and Jeffrey Jennings).

***ISSUE***

Whether petitioner timely filed either a Request for a Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. On January 3, 2001, Kathleen Campbell ("petitioner") brought into New York State certain tangible personal property which had been purchased in Europe. After having received information which had been disclosed on petitioner's U.S. Customs Declaration, the Division of

Taxation ("Division") issued a Notice of Determination, dated March 4, 2002, to petitioner at her address of record (1119 Park Place, Brooklyn, New York 11213) assessing additional sales and use tax due in the amount of \$450.78, plus penalty and interest, for a total amount due of \$626.44 for the year 2001.

2. On June 2, 2004, the Division issued a Consolidated Statement of Tax Liabilities to petitioner which advised her that tax assessed in the amount of \$450.78, plus penalty and interest, for a total due of \$831.25 was subject to collection action and the accrual of additional penalty and interest and that in order to avoid collection action and additional accruals, the aforesaid amount must be paid immediately. A warrant in the amount of \$835.26, consisting of tax of \$450.78 plus penalty and interest, was subsequently filed by the Division on June 29, 2004.

3. Petitioner thereafter filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") which was received by BCMS on August 4, 2004. The Request for Conciliation Conference was signed by petitioner and was dated "7-29-2000" and indicated thereon that it was protesting a notice/assessment dated June 2, 2004 (presumably the Consolidated Statement of Tax Liabilities). The request was sent to BCMS in an envelope which bore a United States Postal Service ("USPS") postmark of July 31, 2004.

4. On August 20, 2004, BCMS issued a Conciliation Order Dismissing Request which stated as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on March 4, 2002, but the request was not mailed until July 31, 2004, or in excess of 90 days, the request is late filed.

The request for a Conciliation Conference is denied.

Thereafter, the Division of Tax Appeals received from petitioner a timely filed petition seeking a hearing in the Small Claims Unit of the Division of Tax Appeals. Since the Division has raised the issue of the timeliness of petitioner's request for a conciliation conference, the scope of the hearing held herein was limited to this threshold jurisdictional issue.

5. To establish the date and method of mailing of the Notice of Determination, the Division offered into evidence: its certified mailing record ("CMR") for statutory notices mailed on March 4, 2002, a copy of the Notice of Determination issued to petitioner, an affidavit of John E. Matthews, an attorney employed in the Division's Office of Counsel (attached to the affidavit was a copy of the petition filed with the Division of Tax Appeals along with copies of the Consolidated Statement of Tax Liabilities and the Warrant referred to hereinabove), affidavits of two employees, Geraldine Mahon and Bruce Peltier, familiar with the creation, processing and mailing of notices of determination, and petitioner's Request for Conciliation Conference. Taken together, these documents are sufficient to establish that the notice was properly addressed and sent by certified mail to petitioner's last known address on March 4, 2002. Petitioner has failed to present any evidence to show that the notice was not properly mailed or timely received or that she filed a timely protest within 90 days of the issuance of the statutory notice.

### ***CONCLUSIONS OF LAW***

A. The Division claims that it is entitled to dismissal of the petition because petitioner failed to file a timely request for a conciliation conference or a timely petition for a hearing before the Division of Tax Appeals. Tax Law § 1138(a)(1) authorizes the Division to estimate tax due and to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed, or if a return, when filed, is incorrect or insufficient. Pursuant to this paragraph,

after 90 days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in the notice together with the interest and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such 90-day period applied to the Division of Tax Appeals for a hearing. As an alternative to filing a petition for a hearing with the Division of Tax Appeals, a taxpayer may file a request for a conciliation conference with BCMS which is what this petitioner elected to do. The time period for filing such request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]). The filing of a petition or a request for a conciliation conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it properly mailed the statutory notice at issue to the taxpayer at his or her last known address (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

B. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, Tax Appeals Tribunal, May 23, 1991). When a notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his or her last known address by

certified or registered mail, the petitioner then bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. In the present matter, the Division has presented sufficient evidence to prove that the Notice of Determination was properly mailed to petitioner at her last known address<sup>1</sup> on March 4, 2002. Accordingly, in order to timely protest the notice, petitioner was required to file the request for conciliation conference within 90 days of March 4, 2002, i.e., on or before June 2, 2002. Since, in 2002, June 2<sup>nd</sup> fell on a Sunday, petitioner had until the next business day, or Monday, June 3, 2002, to file her request (*see*, General Construction Law § 25-a)

D. It is undisputed that petitioner's request for a conciliation conference was not mailed until July 31, 2004 and, therefore, it is clear that the request was filed beyond the statutory 90-day period. Tax Law § 1147(a)(2) provides that when a document which is required to be filed on or before a prescribed date is "delivered by United States mail to the . . . bureau . . . with which or with whom such document is required to be filed . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery." Since the envelope containing petitioner's request for a conciliation conference bore a USPS postmark of July 31, 2004, it is that date which is properly deemed to be the date on which petitioner filed her request and such date is more than two years beyond the statutory 90-day period. Accordingly, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989) and the petition must be dismissed.

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<sup>1</sup> The address of 1119 Park Place, Brooklyn, New York 11213, wherein the Notice of Determination was sent by certified mail on March 4, 2002, was the address set forth by petitioner on both her Request for Conciliation Conference and her subsequent petition to the Division of Tax Appeals.

E. The petition of Kathleen Campbell is hereby dismissed.<sup>2</sup>

DATED: Troy, New York  
December 15, 2005

/s/ Brian L. Friedman  
PRESIDING OFFICER

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<sup>2</sup> Petitioner may not be entirely without recourse in this matter. That is, while the filing of a timely protest allows a taxpayer to challenge a notice of determination prior to payment thereof, a taxpayer may still challenge the merits of the notice by making payment of the assessment and thereafter filing a claim for refund. Accordingly, petitioner may pay the assessment and, within two years of payment, file a claim for refund (Tax Law § 1139[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing or a request for a conciliation conference to contest the refund denial.